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April 13, 2001

Michael L. Terris, Esquire
California Air Resources Board
Office of Legal Affairs
1001 I Street
Sacramento, California 95812

Re: ARB's Service Information Rulemaking

Dear Mr. Terris:

Thank you again for juggling schedules so that you can meet with Charles Lockwood, Julie Becker and me next Wednesday afternoon. We look forward to some interesting and productive discussions with you and your colleagues.

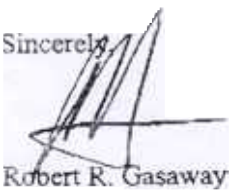
Attached for your consideration is an outline of pertinent legal issues. We believe that our time next Wednesday would be best spent focusing on the following issues appearing in the outline:

I.H Regarding fair and reasonable pricing;
I.D-E Regarding protection for manufacturer trade secrets;
I.A-C Regarding remedies for non-compliance;
I.N Regarding the vehicles covered under the statute;
I.F Regarding regulation of internet access.

As in past rulemakings, these initial submissions spotlight important issues but are not intended to be comprehensive. We look forward to working with you over the next few months on the issues contained in this outline, plus other issues that may suggest themselves as the rulemaking proceeds.

If you have any questions, please do not hesitate to give me a call.

Sincerely,



Robert R. Gasaway

Attachment

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bcc: Julie C. Becker, Esquire (with Attachment)
Charles H. Lockwood, Esquire (with Attachment)

SERVICE INFORMATION RULEMAKING
OUTLINE OF LEGAL ISSUES

I. Issues Concerning Regulations Implementing Substantive Provisions of the Act.

A. The Regulations Should Not Threaten the Withholding of New Vehicle Certifications as a Possible Penalty for Non-Disclosure of Service Information.

1. Health & Safety Code § 43105.5(f) specifies the remedy for non-compliance with the substantive provisions of the statute. Accordingly, under standard canons of construction (such as *expressio unius est exclusio alterius*) these are the *exclusive* remedies that the statute allows.

2. The legislature's intention to preclude certification prohibitions is also clear from the drafting history of the underlying legislation. Earlier versions of bills that did *not* become law provided for suspension of the issuance of certificates. *Compare* SB 1146 (Burton) (original version of § 43105.5(d), which required ARB to "suspend the certification process of all motor vehicles or motor vehicle engines not yet certified by the state board for that motor vehicle manufacturer") *with* SB 1146 (Burton) (June 24, 1999 version) (deliberately deleting that provision from the bill). The fact that these provisions were deleted from the enacted bill is strong evidence that the legislature did not intend that such remedies be available. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432-34 (1987).

3. Imposing such a certification remedy also fails general administrative-law tests for legality. The underlying issue in this service information rulemaking involves the efficiency and competitiveness of the market for vehicle repair. The proposed regulations therefore implicate the protection of air-quality only at the most attenuated remove. Accordingly, ARB could not demonstrate the "necessity" or non-arbitrariness of the costs associated with imposing a certification remedy here. *See* Gov't Code § 11349.1(a)(1). Given the lack of proportion between any violations of these regulations and the economic effects of a certification-prohibition penalty, the penalty is also not a reasonable imposition of costs on the California economy, consumers, or regulated businesses. *See, e.g.*, Gov't Code §§ 11346.2, 11346.3, 11346.5, 11350.

4. Likewise, ARB would act arbitrarily were it to level this draconian remedy in addressing what allegedly is an economic problem, as opposed to an environmental problem.

5. Even if this drastic remedy might otherwise be lawful, a single hearing officer surely could not impose it. Instead, as in other penalty situations, imposition of this "death penalty" would require specific Board action

based on a hearing officer's recommended decision. *See, e.g.*, 17 C.C.R. § 60052.

6. These problems are compounded by the Board's decision to exercise the full extent of fine-imposing authority delegated by the Legislature and thus to impose, without sufficient qualification or elaboration, $25,000 penalties per day per violation.

B. The Regulations Should Not Require Commencement of an Investigation Based on Every Complaint from the Aftermarket.

1 Proposed 13 CCR § 1969(i)(2)(E), as drafted, could be interpreted to *require* the Executive Officer to commence an investigation if any participant in the aftermarket parts community (any "covered person") requests one. *See* proposed 13 CCR § 1969(i)(2)(E) ("The Executive Officer, or his designated representative, *shall* within 30 days of receipt of the request for review, commence an investigation into the issues that have been raised in the request for review and the motor vehicle manufacturer's response, if any.") (emphasis added).

2. The delegation of such "agenda setting" authority to private groups is unconstitutional. *Cf. Hechinger v. Washington Airports Auth.*, 36 F.3d 97, 102 (D.C. Cir. 1994). The regulations should therefore be clarified to make plain that the Executive Officer enjoys discretion in deciding whether to begin an investigation. In accordance with the scheme of California administrative law, that discretion, when exercised to commence an investigation, is reviewable only by the full Board itself or by a California court, not by private groups. *Cf. Fuentes v. Shevin*, 407 U.S. 67 (1972). In addition, because agency resources are limited, they should not be burdened by allowing external groups to second-guess non-prosecutory decisions. *Cf. Heckler v. Chaney*, 470 U.S. 821 (1985).

3. The Alliance would like to work with ARB to establish objective standards for when the Executive Officer should properly exercise his discretion to begin an investigation. *See, e.g.*, section 43105.5(e) ("If the Executive Officer obtains credible evidence that a motor vehicle manufacturer has failed to comply . . . the Executive Officer shall issue a notice to comply to the manufacturer.").

4. Additionally, the regulations should also be clarified to make plain that the Executive Officer may not issue a notice of noncompliance until the Executive Officer has received a manufacturer's response, or the time for submitting such a response has run.

C. The Regulations Should Not Permit "Covered Persons" to Seek Judicial Review of the Executive Officer's Non-Enforcement Decisions.

The proposed regulations purport to grant rights to any "party adversely affected by the final decision of the hearing officer." Proposed 17 CCR § 60060.34. And "party" is defined to include "covered persons." *See* proposed 17 CCR § 60060.2(b)(9). Finally, proposed 17 CCR § 60060.16(a) permits "covered persons" to seek administrative review of Executive Officer decisions that "motor vehicle manufacturers" are in compliance with the proposed substantive regulations. ARB is thus proposing to allow "covered persons" to seek *judicial* review of Executive Officer decisions not to pursue enforcement actions.

2. Apart from categories of jurisdiction created constitutionally, only the *Legislature*, not administrative agencies, can create jurisdiction in California's courts. *See* Calif. Const. art. VI § 10 ("Superior courts have original jurisdiction in all other causes *except those given by statute* to other trial courts.") (emphasis added). ARB cannot confer jurisdiction on California's courts.

3. In particular, there is no indication in the statute that the aftermarket (consisting of "covered persons") is to be given the right to seek judicial review of non-enforcement decisions. (*Compare* Health & Safety Code § 43105.5(b), (c) (providing for adjudication of certain trade-secret disputes and takings matters).) Because the statute does not create its own specific judicial-review process for ARB determinations, ARB may not rely on the underlying Act to support proposed § 60060.34(a), as currently structured.

4. Moreover, even if other, more general statutes (for instance in the Civil Procedure Code) could be read in this context to grant judicial-review rights of non-enforcement decisions to "covered persons," ARB lacks the authority to extend those statutes by regulation.

5. Finally, authorizing review of non-enforcement decisions again raises concerns about giving executive-type enforcement power to private groups and clogging the courts with suits that are simply unsuitable for judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

D. The Regulations Should Not Require Manufacturers to Disclose Trade Secrets in Order to "Mitigate Anti-Competitive Effects."

1 The statute states at its very outset that these regulations shall require disclosure of information *only* "to the extent" that such disclosure is not "limited or prohibited by federal law." *See* Health & Safety Code § 43105.5(a). This limiting proviso was a key statutory provision that was adopted during the legislative process specifically to reconcile California law and regulations with federal law. Under this general limitation, these regulations may not violate vehicle manufacturers' federal law rights.

2. Specifically, because section 43105.5(a) stipulates that the regulations will comply with federal law, the regulations may not place burdens on motor vehicle manufacturers that are inconsistent with the requirements of the Commerce Clause, Art I, Section 8, Clause 3, of the U.S. Constitution. That is, the language in the statute regarding disclosure of information "necessary to mitigate anticompetitive effects," Health & Safety Code § 43105.5(b), must be read to mean "information necessary to mitigate anti-competitive effects in an manner consistent with the Commerce Clause and other federal law."

3. In light of the general limitation of section 43105.5(a), the regulation may not require the disclosure of trade secrets used in interstate commerce in order to mitigate anti-competitive effects.

   a. Because the market for new motor vehicles is by its nature international, and trade-secret information is infinitely reproducible, the market for trade secret information is inherently the concern of the national government's interstate and international regulatory regime. Simply put, there is no practical way for an aftermarket manufacturer to gain access to trade secrets for use only in California-bound automotive parts.

   b. Because the relevant intellectual-property market is inherently national, it must be governed by a unified national and international regulatory regime. *See Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378 (1983); *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993). Accordingly, California may not regulate in order to address perceived competitive imperfections in this national and international marketplace.

E. The Regulations Should Not Require Manufacturers to Obtain Judicial Orders in Order to Protect Trade Secrets From Disclosure.

1 Under Health & Safety Code section 43105.5(a) and the Commerce Clause, California regulations may not create burdens on interstate commerce that are disproportionate to their putative local benefits. *See Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). Nevertheless, the proposed regulatory provisions would require motor vehicle manufacturers to obtain prior judicial approval for each and every trade secret they withhold. *See, e.g.*, proposed 13 CCR § 1969(h).

2. Because this requirement burdens interstate commerce far beyond the extent to which it provides local benefits, it is unlawful under section 43105.5(a) and the Commerce Clause.

3. The requirement that motor vehicle manufacturers obtain prior judicial approval before withholding trade secrets also contradicts section 43105.5(b) of the Health & Safety Code.

   a. In connection with the disclosure of trade secrets, subsection 43105.5(b) expressly refers to "the request of a covered person seeking disclosure of the information." Especially in light of the general limitation of subsection 43105.5(a), this language in subsection 43105.5(b) should be interpreted to mean that "covered persons" must go to court to challenge a withholding of trade secrets that is allegedly contrary to the statute and/or the implementing regulations.

   b. The statute thus authorizes Manufacturers to withhold trade-secret information unless and until a challenging party successfully sues to establish that the information is not a protected trade secret.

4. So far as we know, the law of all 50 states presumes that trade-secret protection is available when claimed and places the burden of demonstrating the contrary on those who would change the status quo. Because the proposed regulations would reverse that presumption without any good reason, they also run afoul of the "necessity" prerequisite to regulation under the California APA. *See* Gov't Code § 11349.1(a)(1).

F. The Regulations Should Not Include Detailed Specifications for Internet Disclosures.

The regulations' proposal to minutely regulate the format in which Internet information is presented (*see* proposed 13 CCR §§ 1969(d)(3)(D), 1969(d)(3)(K), 1969(d)(3)(M)(iii)) constitutes compelled speech that implicates the First Amendment to the United States Constitution. *See United States v. Playboy Entertainment Group*, 120 S. Ct. 1878 (2000) (striking down restrictions on method of transporting sexually oriented cable TV programs); *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (Internet subject to the same level of protection as the print media); *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795, 798-99 (1988) (compelled speech is unconstitutional); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (unreasonably burdensome disclosure regulations violate the First Amendment).

2. Because these Internet formatting regulations are not the least burdensome regulation necessary to accomplish the statute's disclosure goals, all of these regulatory requirements run afoul of the First Amendment.

3. Moreover, because these Internet formatting regulations are also superfluous, they fail the "necessity" requirement of California administrative law.

a. The regulatory preamble states that ARB's policy concern in detailing Internet web-page formatting is to ensure that "inflexible pricing and registration structures" do not frustrate information access. Proposal at A1-2.

b. But, given that information must also be made available in CD-ROM format, this concern is alleviated. Because this information will be available even outside of the Internet, manufacturers' Internet sites must be user friendly, or they will not be used.

c. ARB can rely on the free market to provide usable websites, for the same reasons that the market offers usable sites providing other types of diagnostic and technical information, such as medical information.

d. At a very minimum, the ARB should stay its regulatory hand with respect to the *means* of disclosure until data is available concerning the actual usage of various forms of service information.

4. In addition, the requirement that training CD-ROMs be made available over the Internet should be eliminated. Internet access to CD-ROM compilations would require prohibitively long download times and create insoluble risks of software piracy. *See* proposed 13 CCR § 1969(d). In addition, the requirement that manufacturers place all contents of a website on a CD-ROM should also be scrapped, as unnecessary. *See* proposed 13 CCR § 1969(d)(2).

5. Similarly, the proposed Internet formatting regulations are overly detailed prescriptive standards for which a need has not been properly explained by ARB pursuant to its duties under the California APA to adopt performance standards in preference to prescriptive standards. *See* Gov't Code § 11346.2.

G. The Regulations Should Not Mandate Telephone Web Support.

1 Requiring manufacturers to provide 24-hour per day call-center support creates overly burdensome staffing and training requirements. This is especially true because the Alliance's member companies' experiences to date suggest that it might well be that few users would attempt to use such services, even if they were required. More importantly, the requirement is unnecessary to ensure website functionality for the vast majority of potential users. Accordingly, maintaining such a requirement would violate ARB's duties to adopt only regulations that are necessary and represent reasonable impositions of cost on the California economy, consumers, and regulated businesses. *See* Gov't Code §§ 11346.2, 11346.3, 11346.5, 11350.

2. Even assuming there was sound policy behind such a requirement, however, it should nonetheless be abandoned.

   a. The statute requires that information be made available over the Internet, not that it be explained by telephone.

   b. Forcing vehicle manufacturers to provide such support would entail regulations permitting them to recover the associated costs plus a reasonable return. Such requirements would thus entangle the agency in extensive and unnecessary pricing proceedings explained by telephone.

   c. ARB should stay its hand until the mandated websites are up and running and then determine the real needs of users at that time.

H. The Regulations Should Permit Vehicle Manufacturers to Earn a Reasonable Return on Their Investments.

The regulatory preamble states, "To this end, ARB staff's proposed regulatory approach is to define factors that will permit manufacturers to recover costs associated with providing required information and diagnostic tools, but not to the point that the providing of information is a source of profit." Proposal at A1-3 to A1-4. This rule, if followed, would be unlawful under the statute, the California Constitution, and the federal Constitution.

2. The rates regulated entities are permitted to charge must be sufficient to cover their costs, plus a reasonable rate of return on capital invested. *See Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 768 (1997); *A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333 (9th Cir. 1996) (affirming trial court ruling that ambulance rates were set impermissibly low); *Richardson v. City and County of Honolulu*, 802 F. Supp. 326, 338 (D. Haw. 1992), *aff'd*, 124 F.3d 1150 (9th Cir. 1997).

3 In addition, under-compensating information providers would constitute requiring prohibited takings for private purposes; specifically, the prohibited private purpose of allowing "covered persons" to make unwarranted profits. *See City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414 (1985) (affirming, but not itself addressing, the trial court ruling that takings must be for public purposes).

4. Finally, it would arbitrary and capricious for the ARB to ignore the takings aspects of a regulatory program. *See National Wildlife Fed'n v. ICC*, 850 F.2d 694 (D.C. Cir. 1988).

5. Moreover, as a policy matter, the proposal to under-compensate manufacturers would frustrate the legislative purposes of the statute. If manufacturers are unable to obtain reasonable compensation for the

information they provide, they will have fewer incentives to provide detailed, user-friendly service information.

6. Accordingly, the regulations may not focus only on "net cost," while explicitly excluding consideration of "research and development" costs. *See* proposed 13 CCR § 1969(a)(9)(B). They must also include provisions permitting a reasonable rate of return.

7 It is no answer to these serious legal issues to say that a jury trial can be held on takings questions pursuant to Health & Safety Code § 43105.5(c). Such a jury-trial right attaches only in certain instances. Moreover, this right does not relieve the agency of its independent obligation to comply with the Constitution. *See Meredith v. Fair*, 328 F.2d 586 (5th Cir. 1962) (en banc), *cert. denied sub nom. Mississippi v. Meredith*, 372 U.S. 916 (1963).

8. As an overall matter, net costs to dealerships, which face significant contractual and regulatory requirements not necessarily borne by aftermarket manufacturers, should be the considered. Because the goal of the statute is to provide equal access, provisions prohibiting price discrimination could go far in relieving the agency of the administrative burdens entailed by setting actual prices.

I. The California Regulations Should Not Impose Burdensome Requirements That Are Intended to Serve Purposes Already Being Met by Parallel EPA Regulations.

1 The regulatory preamble notes an intention to ensure consistency with the EPA service information rule. *See* Proposal at A1-2. But in order to pass the non-duplication aspect of the review process superintended by the California Office of Administrative Law, these regulations must implement only provisions that are independently necessary to serve purposes that would not otherwise be met. *See* Gov't Code § 11349.1(a)(6); 1 C.C.R. § 12.

2. In addition to non-duplication, ARB is also required to assess whether any regulations it adopts are reasonably necessary to effectuate statutory purposes and to assess economic impacts so that it can avoid the arbitrary imposition of unnecessary regulatory costs. While these requirements are unavoidably interdependent (duplicative requirements are by their nature neither necessary nor a reasonable imposition of costs on the California economy, consumers, or regulated businesses), they are expressed in law as independent legal requirements. *See* Gov't Code §§ 11346.2, 11346.3, 11346.5, 11350.

3. Accordingly, before promulgating final regulations, ARB staff should work with manufacturers and U.S. EPA to determine which, if any,

California disclosures going beyond EPA-mandated disclosures are necessary and thus lawful.

J. The Regulations Should Maintain Consistency with Federal Copyright and Patent Law by Making Clear that They Do Not Contemplate the Forced Licensing of Federal Patents and Copyrights.

1 The California legislature enacted two separate provisions requiring these regulations to maintain consistency with federal copyright and patent law. *See* Health & Safety Code §§ 43105.5(a) (regulation shall be adopted "to the extent not prohibited or limited by federal law"); 43105.5(h) ("Nothing in this section is intended to authorize the infringement of intellectual property rights embodied in United States patents trademarks, or copyrights.").

2. These statutory provisions should be expressly acknowledged in the agency's final regulations. Ensuring that these fundamental limitations are not overlooked will prevent wasting the parties' and agency's time and resources. Specifically, the regulations should acknowledge that forced licensing of intellectual property prohibited by either federal patent or copyright law, and thus state law to the contrary, is preempted. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546-547 (1985); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 432-33 (1945); *Cataphote Corp. v. DeSoto Chem. Coatings, Inc.*, 450 F.2d 769, 774 (9th Cir. 1971).

3. In this connection, the regulations should also make clear that the First Amendment limits the agency's ability to compel manufacturer speech. *See International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (invalidating mandatory labeling requirement under the First Amendment).

K. The Regulations Should Not Require Disclosure of "Mode 6" Information.

1. Retroactively developing the information needed to interpret "mode 6" data is expensive. In order to provide this information for past model-year vehicles, manufacturers would need to painstakingly review and interpret the source code of *each* covered OBD system they have installed. Furthermore, this information is not needed for fast and accurate repair of vehicles and is not made available to new car dealerships.

2. Nevertheless, manufacturers are willing to provide "mode 6" scaling data in an effort to work with ARB and to go beyond the requirements of the legislation, which does not require the disclosure of any "mode 6" information.

3. Going beyond this voluntary concession, and requiring the disclosure of all "mode 6" information, would thus not only be *ultra vires*, but

inconsistent with ARB's obligation to impose the least burdensome means providing such. *See* Gov't Code §§ 11346.2, 11346.3, 11346.5, 11350. Requiring the disclosure of non-scaling-data "mode 6" information is especially questionable if the goal of the statute is support improvements in air quality.

L. The Regulations Should Establish Realistic Response Deadlines.

1 Proposed 13 CCR § 1969(h)(3) imposes time constraints that it is impossible to meet even under the best possible circumstances. In order to meet the mandated 3-day turn-around period, full-time specialized staff would have to be devoted to the matter. This would simply drive up costs with no real corresponding benefit for users. A 30-day time period would be more realistic and would permit manufacturers to meet their obligations in a timely, rational fashion.

2. The time periods contemplated in administrative litigation are also too short, though in this case the brevity of the deadlines threatens the quality of the procedural opportunities being afforded to manufacturers. The time to respond to show cause orders should be extended. *See* proposed 13 CCR § 1969(i)(1)(D). So should the time for manufacturers to respond to covered persons' requests for review. *See* proposed 13 CCR § 1969(i)(2)(D). Finally, manufacturers should be permitted additional time to come into compliance in cases where the manufacturer decides not to initiate administrative review proceedings. *See* proposed 13 CCR § 1969(j)(1).

M. The Regulations Should Clarify Key Regulatory Terms.

1 In order to provide certainty and avoid imposing constitutionally excessive fines, the agency should define what constitutes a single "violation." For instance, if a manufacturer sets up a web site that is later found to have font sizes that are too small, a search engine that is not "comprehensive," and the manufacturers fails on three occasions to timely respond to inquiries, how many violations have occurred?

2. ARB should clarify that the Internet disclosure requirements apply only to covered persons (i.e., to California aftermarket participants, and not those from out of state).

3 At present, "emission-related motor vehicle information" is defined to mean "information regarding" any "original equipment system or component that *is likely to* impact emissions." *See* proposed 13 CCR § 1969(b). This term should be further defined through a listing of specific automotive systems and components.

4. The term "day," used throughout the regulations, should be defined as a business day. This definition is consistent with the definition proposed in ARB's draft OBD enforcement regulation, Section 1968.2.

N. The Regulations Should Require Disclosure of OBD Systems Information Only for 1996 and Later Model Year Vehicles.

1 The statute plainly states that OBD II systems information may be required only for 1996 and later model year vehicles. *See* Health & Safety Code § 43105.5(a)(4). *See* Gov't Code § 11350(b)(1) ("agency[must] determin[e] that the regulation is reasonably necessary to effectuate the purpose of the statute").

2. Accordingly, section 1969(c)(2) should be amended to reflect this statutory directive. *See* Gov't Code § 11350(b)(1).

II Issues Concerning Hearings Procedures

A. In Certain Respects, the Proposed Hearing Regulations Violate the Terms of the Statute and Manufacturers' Due Process Rights.

1 Under the proposed hearing regulations, most of the evidence against vehicle manufacturers will be established without the manufacturers being able to exercise procedural rights except the ability to respond to the evidence submitted by "covered persons." If this system in broad outline is established, the Executive Officer should be required to state in writing his or her reasons for making the determinations he or she makes. Otherwise, vehicle manufacturers will have no basis for challenging Executive Officer determinations grounded on conflicting evidence.

In addition, particularly if freezing the vehicle manufacturer's ability to certify vehicles or other significant penalties are available, due process requires manufacturers to be given far more extensive procedural protections, most importantly the ability to confront adverse witnesses and to cross-examine them. *See, e.g., Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264 (1987); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Billington v. Underwood*, 613 F.2d 91, 95 (5th Cir. 1980); *Carter v. Morehouse Parish Sch. Bd.*, 441 F.2d 380, 382 (5th Cir.), cert. denied, 404 U.S. 880 (1971).

3 Intervention rights should be made clear in order to avoid any separate and wasteful system of aftermarket- and manufacturer-initiated proceedings.

a. If a hearing officer decides, pursuant to a "covered person" "request for review," that the Executive Officer was wrong to find a manufacturer in compliance with the law, then the upshot presumably will be for the hearing officer to order the Executive Officer to issue a notice of noncompliance.

b To avoid the potentially wasteful second round of litigation in an administrative forum that would result from a manufacturer in turn challenging *that* determination, the regulations should provide for a vehicle manufacturer's right to intervene in hearings implicating its information that has been initiated against the Executive Officer by a "covered person." In this manner, the parties may be aligned in a single, unified administrative proceeding as logic dictates.

B. The Regulations Should Make Clear That the Burden of Proof in Any Contested Hearing Rests on the Party or Parties Attempting to Establish a Violation of the Law.

1 Because there is no reason to presume that a violation has occurred, the Executive Officer should be required to prove the alleged violation *before* the neutral hearing officer orders relief (unless the manufacturer accedes to such relief by failing to initiate a hearing).

2. There is no basis in law for switching the traditional burden of proof as there is in some other types of proceedings. *See Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802 (1977).